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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 556

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, A MUNICIPAL CORPORATION, ET AL.,

Petitioners,

v.

EVELYN SEBER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The memorandum brief that follows was written immediately after oral argument was had in this case on Thursday, March 4, 1943, in order that it might be delivered to the printer on Thursday night, and any apparent shortcomings

may be chargeable to pressure and lack of time. We have, therefore, not had as much time for preparation as would have been desirable.

I.

The Acts in Question Are Unconstitutional.

The fundamental weakness of the Government's position is made very clear at p. 11 of *amicus curiae* brief, in the following language:

> "Even after the territories in which they lived had been organized as States, the federal power over the Indians was never seriously doubted, although its source has been a *subject of dispute*. It would seem, however, that the power is derived from *history* and *necessity*, and *might if* an *express* provision were required, be said to take its ultimate origin in the commerce clause, the treaty-making power and in the 'necessary and proper clause' of Article I. • • • "

Here then is what the Federal government asserts as the basis for congressional interference with State taxation: (1) "History and necessity"; (2) The commerce clause; (3) The treaty-making power; (4) The "necessary and proper clause" of Article I. We will deal with them in order.

1. "History and necessity." As a basis for Federal control of Indians, we have no quarrel with "history and necessity." But it should be obvious that "history and necessity" cannot afford a basis for Federal interference with State taxation—in the absence of constitutional authorization of such an extreme measure.

2. The commerce clause provides that Congress shall have power:

> "• • • to regulate commerce with foreign nations and among the several states, and with the Indian *Tribes*" (Emphasis supplied).

Observe that Congress has power to regulate commerce with Indian *Tribes*, not Indian *individuals*. The importance of this distinction cannot be over-emphasized in this case. *Never before* has it been important that this Court or other courts recognize the distinction! *Always* in the past, questions of tax exemption have involved *tribal* lands—lands *allotted* under treaties with Indian Tribes—NOT lands PURCHASED with individual funds for the benefit of individual Indians rather than the tribe as a whole. The Acts of Congress under attack here do not deal with any *Tribe* or *Tribes* of Indians. They simply deal with *individuals* who happen to have Indian blood.

The Constitution *could have* clothed Congress with the power to regulate commerce with *individual* Indians if the framers had wanted to do so, but they chose to limit the Congressional power to "Tribes." The importance of the distinction between the word "Tribe" and the word "individual" cannot be over-emphasized in this case.

Does the court wonder why this distinction has never before, in all the years of Indian litigation, been brought to its attention? The answer is that Congress has always before recognized the limitation on its power. Prior to the passage of the Acts in question here, all Congressional legislation on Indian matters has dealt with Indian Tribes rather than Indian individuals, insofar as tax exemption was concerned. Always in the past, questions of tax exemption have involved tribal lands—lands *allotted* under treaties with Indian *Tribes*—NOT lands PURCHASED with individual funds for the benefit of individual Indians rather than the tribe as a whole.

3. The treaty-making power of Congress affords no authority to Congress to pass Acts of the character here in question. No treaty is presently before us. The transactions affected by the Acts were ordinary commercial trans-

actions. Certain individual Indians, being possessed of certain private funds, did purchase certain lands. The transaction involved in the case at bar was simply a purchase of land by Wosey John Deere out of oil royalty money belonging to her, and which purports to exempt such purchased land from State taxation.

4. The "necessary and proper clause" has no application here. Since no power was delegated to Congress authorizing Congress to interfere with State taxation in a case of this character, there is no occasion for the "necessary and proper clause" to come into play.

At p. 12 of the *amicus curiae* brief occurs the following interesting statement:

> "Having in the exercise of its delegated powers [what delegated powers?] created a situation in which protection was required and having either expressly or impliedly undertaken the resultant governmental obligation to afford that protection, the federal government had the consequent authority to do all that was necessary to perform the obligation even though the Indians resided within the boundaries of the states * * *"

In answer to the above-quoted statement, we assert that nothing therein affords any basis for Federal interference with State taxation. The mere fact that the Federal government has obligations and responsibilities toward Indians does not thereby place in the Federal government any power to interfere with State taxation. The mere fact that the Federal government has "undertaken to protect" the Indians does not thereby place in the Federal government any power to interfere with State taxation. If the Federal government has incurred an obligation to protect the Indians from loss of their property at tax sale, then let Congress continue to appropriate money to pay those taxes, as

it did in Sec. 1 of Act of June 20, 1936. Congress has done this before and it can do it again.

At pp. 8 and 9 of Petitioners' Original Brief, we have dealt with the abuse of legal concepts by the courts, and particularly the concept of "Federal instrumentality." All that was said there has application with equal force to the use of such concepts as "guardianship" and "wardship", in connection with Congressional control of Indian affairs. The Constitution does not provide that Congress shall be the "guardian" of the Indians and that the Indians shall be the "wards" of the Congress. But we have no particular objection if Congress sees fit to assume burdens of guardianship without Constitutional authorization. However, we do vigorously contend that concepts not found in the Constitution—concepts such as "Federal instrumentality," "guardian," "ward"— *offer no justification for Federal interference with State taxation.*

For a critical approach to traditional constitutional concepts, we quote the following language, incorporated in *Erie v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817:

> "I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has often been advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now, erroneously, repeated the same doctrine.

But, notwithstanding the frequency with which the doctrine has been repeated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State, and to that extent, a denial of its independence."

II.

Enabling Act and Oklahoma Constitution.

Reference has been made in the *amicus curiae* brief, at pp. 13, 47, to Sec. 1 of the Oklahoma Enabling Act and Sec. 6, Art. X, Oklahoma Constitution. However, in quoting from the Enabling Act (p. 13) the government omitted some very significant language. We, therefore, quote at length:

SECTION 1. "Admission of Oklahoma and Indian Territory as State. That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, that *nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories* (so long as such rights shall remain unextinguished) *or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed*" (34 Stat. L. 267).

The above-quoted provision was considered in *United States* v. *Board of Com'rs of McIntosh County*, 271 Fed. 747 (affimd. 284 Fed. 103, 263 U. S. 689 [No. 178]). The following syllabi are quoted from that case:

5th Syllabus:

"'Const. Okl. art. 10, S. 6, exempting from taxation property exempt by reason of treaty stipulations existing between Indians and the government, or by federal laws during the force and effect of such treaties or laws, obviously exempts such lands only as were exempt under treaties and laws in existence when the state was admitted."

9th Syllabus:

"The provisions of the Oklahoma Enabling Act and Constitution exempting from taxation property belonging to or thereafter purchased by the United States and all Indian property exempted by existing treaties or laws do not exempt from taxation lands theretofore taxable, after their purchase by the Secretary of the Interior for a full-blood Creek Indian, to be held under the same restrictions on alienation as were imposed on the lands from which the purchase price was derived as oil royalties or proceeds of sale."

It has always been recognized that a territory—in seeking to be admitted into the Union as a State—must yield to existing vested property rights. Thus Oklahoma was bound to respect vested Indian rights to tax exemption at the time statehood was acquired.

But it has likewise always been recognized that no State can bargain away its authority in regard to property to which no vested rights as to tax immunity had attached at time of statehood. To hold otherwise would be to deprive the affected State of its right to come into the Union "on an equal footing with the original States." (*State of Oklahoma* v. *A. T. & S. F. Ry. Co.*, 220 U. S. 277, 31 S. Ct. 434.)

The Meriam Report.

The *amicus curiae* brief, at pp. 21, 22, 24, 27, 28, makes reference to the Meriam Report on Indian Administration. The Meriam Report dealt with the situation arising when allotted lands were converted into money, which money was in turn converted into more desirable land. In a situation of that character, the original allotted lands, having been sold, are thereby subjected to taxation, and the State is not seriously prejudiced. But in the case at bar, the lands were purchased out of *oil and gas royalty* money, and the original allotment continues to remain tax exempt; so that the State is entirely without compensation. With oil wells on Indian lands flowing every hour of every day and piling up restricted funds for investment in Oklahoma property, which is being taken off the tax rolls in alarming amounts, the time will shortly arrive when the governmental functions of the State and various subdivisions will be paralyzed.

IV.

Enrolled and Unenrolled Indians.

As was pointed out in our original brief, the Supreme Court of the United States has never held that purchased lands, other than those of a *tribal character* allotted under treaties with the Indians, could be rendered tax-exempt by mere *fiat* of Congress, simply because they were owned by an individual Indian, or because restricted funds of an Indian grantor were used in their purchase. Furthermore, the Supreme Court of the United States has never attempted to make any distinction between enrolled Indians and unenrolled Indians in the cases which have come before it involving the right of States to tax Indian lands for the

reason that only rights of enrolled Indian allottees were involved.

V.

Erroneous Statements in Amicus Curiae Brief.

Attention should first be called to serious inaccurate and misleading statements at pp. 32, 33, and 38 of *amicus curiae* brief.

At pp. 32, 33, *amicus curiae* says:

> "They [petitioners] say first (Pet. 19-21) that the act does not apply to lands 'purchased from trust or restricted funds' at all (although Congress used those very words) but applies only to lands purchased by the Secretary of Interior for 'landless Indians' from funds appropriated by Congress for that purpose * * *"

At p. 33, *amicus curiae* says, in italics:

> "The application of the Act of June 20, 1936, is not limited to lands purchased from funds appropriated by Congress for 'landless Indians.'"

At p. 38, *amicus curiae* says, in italics:

> "The application of the Act of May 19, 1937, is not limited to lands purchased from funds appropriated by Congress for 'landless Indians.'"

The above-quoted statements are inaccurate and irrele- . . Petitioners have never made any reference to lands purchased out of Congrssional appropriations. Petitioners' Second Proposition deals exclusively with lands purchased out of trust or restricted funds. See pp. 18, 19, 21 of Petitioners' Brief.

Conclusion.

It is, therefore, respectfully submitted that the decisi
of the United States Circuit Court of Appeals for the Ten
Circuit should be reversed.

Respectfully submitted,

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